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Classified Information Procedures Act (CIPA): An Overview

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THE CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW

SUMMARY

When a violation of criminal law potentially implicates sensitive national security concerns, the Executive Branch may face a dilemma of either declining to prosecute a violation of law or risking disclosure of sensitive materials during a criminal trial. Prior to 1980 it was particularly difficult to assess whether a successful prosecution could proceed without jeopardizing disclosure of sensitive information because the government had no means of determining the extent, nature, or relevance of classified information at issue prior to its introduction at trial. In 1980, however, Congress enacted the Classified Information Procedures Act (CIPA) to provide a means for determining at an early stage whether a "disclose or dismiss" dilemma exists in a potential prosecution or whether a prosecution may proceed that both protects information the Executive regards as sensitive to security and assures the defendant a fair trial consistent with the mandates of the Constitution.

Among its core provisions, CIPA initiates an early focus on security issues by requiring a defendant in a criminal case to notify the prosecution and the court prior to trial of any classified information that he reasonably expects to disclose in his defense. Also, the notice provision is a continuing one, and a defendant must provide a separate notice of any additional classified information that he becomes aware of after his initial notice and intends to use. A defendant may not introduce any classified information that was not included in a CIPA notice.

Issues on the use, relevance, and admissibility of classified information that either was included in a notice by the defendant or is expected to be used by the prosecution are considered by the court in pretrial hearings. Under current case law, the court to some degree may take national security interests into account in determining admissibility. If a court finds that certain classified information is admissible into evidence, the court then may consider a request by the government to substitute summaries or redacted documents in lieu of original documents. The court may authorize a substitution in such a case only when a substitution affords a defendant substantially the same opportunity to defend himself as introduction of the original documents would. Once a court makes its findings on what information must, in fairness to the defendant, be introduced, the Attorney General may file an objection to disclosure on national security grounds, and the prosecution thereafter must be partially or completely dismissed.

The courts generally have upheld CIPA to constitutional challenge and have enforced the sanctions set forth in the statute in appropriate cases. However, the judge in the Iran-Contra prosecutions has ruled that CIPA procedures must give way when they risk excessive exposure of the defendant's case. This ruling furthers a frequently made observation that CIPA is most effective in resolving potentially troublesome cases in which the classified information at risk proves to be only marginally sensitive or marginally relevant. It remains problematic whether the disclose or dismiss dilemma posed by a prosecution involving sensitive information at its core can be resolved in a manner that preserves the rights of the defendant.

CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW

The Executive Branch of our Government has the authority to prosecute violations of federal criminal law.[1] The Executive Branch also takes measures to protect information in its possession relating to national security and to prevent its disclosure.[2] When a violation of criminal law potentially implicates sensitive national security concerns, the Executive thus may face a dilemma of either declining to prosecute a violation of law or risking disclosure of sensitive materials during a criminal trial.[3] Prior to 1980 it was particularly difficult to assess whether a successful prosecution could proceed without jeopardizing disclosure of sensitive information because the government had no means of determining the extent, nature, or relevance of classified information at issue prior to its introduction at trial. In 1980, however, Congress enacted the Classified Information Procedures Act (CIPA)[4] in order to provide a discrete and orderly framework for determining at an early stage whether a "disclose or dismiss" dilemma exists in a potential prosecution or whether a prosecution may proceed that both protects information the Executive regards as sensitive to security and assures the defendant a fair trial consistent with the mandates of the Constitution.

I. LEGISLATIVE HISTORY OF CIPA

During the 1970's the number of prosecutions in which the actual or prospective disclosure of classified information became an issue substantially increased and was expected to increase further.[5] The term "graymail" came into use to refer "to actions of a criminal defendant in seeking access to, revealing, or threatening to reveal classified information in connection with his defense."[6] The problems that arose during this period from the inability to resolve issues relating to classified information prior to trial was described by Assistant Attorney General Philip Heymann as follows:

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[1] U.S. CONST. art. 2, § 3, cl. 3 (President to take care that the laws be faithfully executed).

[2] Exec. Order No. 12356, 47 Fed. Reg. 14874, 15557 (1982).

[3] Criminal defendants enjoy a constitutional right to a public trial. U.S. CONST. amend. VI.

[4] Pub. L. No. 96-456, *codified at* 18 U.S.C. App. IV.

[5] *E.g.*, H.R. Rep. No. 96-831, 96th Cong., 2d Sess. 7 (1980); *see also Graymail Legislation: Hearings Before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence*, 96th Cong., 1st Sess. 4-5 (1979) (statement of Assistant Attorney General Philip Heymann).

[6] H. R. Rep. No. 96-831 at 7.

> To fully understand the problem, it is necessary to examine the decision making process in criminal cases involving classified information. Under present procedures, decisions regarding the relevance and admissibility of evidence are normally made as they arise during the course of the trial. In advance of trial, the government often must guess whether the defendant will seek to disclose certain classified information and speculate whether it will be found admissible if objected to at trial. In addition, there is some question whether material will be disclosed at trial and the damage inflicted before a ruling on the use of the information can be obtained. The situation is further complicated in cases where the government expects to disclose some classified items in presenting its case. Without a procedure for pre-trial rulings on the disclosure of classified information, the deck is stacked against proceeding with these cases because all of the sensitive items that might be disclosed at trial must be weighed in assessing whether the prosecution is sufficiently important to incur the national security risks.
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> In the past, the government has foregone prosecution of conduct it believed to violate criminal laws in order to avoid compromising national security information. The costs of such decisions go beyond the failure to redress particular instances of illegal conduct. Such determinations foster the perception that government officials and private persons with access to military or technological secrets have a broad de facto immunity from prosecution for a variety of crimes. This perception not only undermines the public's confidence in the fair administration of criminal justice but it also promotes concern that there is no effective check against improper conduct by members of our intelligence agencies.[7]

Mr. Heymann's remarks were made in hearings on unauthorized disclosure of classified information conducted by a panel of the House Intelligence Committee in January 1979. During the previous year, a subcommittee of the Senate Select Committee on Intelligence had completed an extensive study of national security information and the administration of

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[7] *Graymail Legislation: Hearings Before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence*, 96th Cong., 1st Sess. 4-5 (1979) (statement of Assistant Attorney General Philip Heymann).

justice.[8] In its subsequent report of its study, the subcommittee prefaced its detailed discussion and recommendations with the following observations on the difficulty of prosecuting national security cases:

> The subcommittee discovered that enforcement of laws intended to protect national security information often requires disclosure of the very information the laws seek to protect. Indeed, the more sensitive the information compromised, the more difficult it becomes to enforce the laws that guard our national security. At times then, regardless of whether the compromise is to a newspaper reporter or directly to a foreign agent, the Government often must choose between disclosing classified information in a prosecution or letting the conduct go unpunished. In the words of one Justice Department official who testified before the subcommittee, "To what extent must we harm the national security in order to protect the national security?"[9]

Subsequent discussion in the report further highlighted the conflicts that often exist within the Executive branch:

> At the heart of this failure of enforcement is a very deep-seated conflict between the concerns of the intelligence community on the one hand, and the Department of Justice on the other in enforcing the espionage statutes. The conflict arises over whether publicly to disclose classified information necessary to conduct the investigation and to proceed with the prosecution. Indeed this question of whether or which classified information is to be used in a particular judicial proceeding is a pervasive problem that goes well beyond enforcement of the espionage statutes.[10]

In light of the intrabranch conflict that it perceived to inhere in national security cases, many of the subcommittee's recommendations focused on actions within the Executive Branch. Among these recommendations were (1) development of administrative procedures for disciplining employees

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[8] STAFF OF THE SUBCOMMITTEE ON SECRECY AND DISCLOSURE OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE, 95TH CONG., 2D SESS., NATIONAL SECURITY SECRETS AND THE ADMINISTRATION OF JUSTICE (Comm. Print 1978) [hereinafter cited as *Senate Print*]. Among the proceedings held during the study was *The Use of Classified Information in Litigation: Hearings Before the Subcommittee on Secrecy and Disclosure of the Senate Select Committee on Intelligence*, 95th Cong., 2d Sess. (1978).

[9] *Senate Print* at 1.

[10] *Id.* at 6.

responsible for violations of security or other laws, (2) issuance of guidelines by the Attorney General regarding the responsibility of the intelligence community to report crimes, and (3) issuance of binding regulations by the Attorney General setting forth procedures for the provision by intelligence agencies of information relevant to criminal proceedings.[11] Other recommendations of the subcommittee focused on suggestions for congressional legislation. Perhaps foremost among these recommendations were consideration of a special omnibus pretrial proceeding to be used in cases where national secrets were likely to arise.[12]

In July 1979, three bills were introduced proposing procedures similar to those discussed in the report of the Senate subcommittee. These bills were H.R. 4736, the House Intelligence Committee bill; H.R. 4745, the Administration bill; and S. 1482, the Senate Judiciary Committee bill. The House bills were referred to both the House Intelligence Committee and the House Judiciary Committee. The Subcommittee on Legislation of the House Intelligence Committee held hearings on the two House bills in August and September of 1979.[13] Using H.R. 4736 as its vehicle, the House Intelligence Committee favorably reported a classified information procedures bill March 18, 1980.[14] The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held further hearings on H.R. 4736 in April and May of 1980.[15] On September 17, 1980, the Judiciary Committee also reported H.R. 4736 favorably with an amendment requiring that reports on prosecutions implicating national security and on the operation of the legislation be submitted to both the Intelligence and the Judiciary Committees.[16] The bill subsequently passed the House by voice vote September 22, 1980, without further amendment as its version of S. 1482.[17] In the Senate, S. 1482 had been referred to the Senate Judiciary Committee and reported to the full Senate June 18, 1980.[18] The bill passed the Senate

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[11] *Id.* at 31, 32.

[12] *Id.* at 32.

[13] *Graymail Legislation: Hearings Before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence*, 96th Cong., 1st Sess. (1979).

[14] H.R. Rep. No. 96-831, Part 1, 96th Cong., 2d Sess. (1980).

[15] *Use of Classified Information in Federal Criminal Cases: Hearings Before the Subcommittee on Civil and Constitutional Rights of House Committee on the Judiciary*, 96th Cong. 2d Sess. (1980).

[16] H.R. Rep. No. 96-831, Part 2, 96th Cong., 2d Sess. (1980).

[17] 126 CONG. REC. H9311 (daily ed. September 22, 1980).

[18] S. Rep. No. 96-823, 96th Cong., 2d Sess. (1980).

by voice vote without further amendment June 25.[19] While the versions of S. 1482 that were passed by the respective Houses were substantially similar, several differences between them remained to be resolved at conference. Among these differences were the reach of the Act (as reflected in the definition of the type of information that would trigger the pretrial procedure process), the sequence of various presentations during the pretrial hearing, and the standard for allowing presentation of evidence at trial in an alternative form. The conference resolved these issues by adopting the broader Senate version of protected information, a hybrid two-stage hearing procedure, and the more restrictive House standard for allowing disclosure of alternative evidence.[20]

II. PROCEDURES FOR ASSESSING CLASSIFIED INFORMATION

A. Pretrial Conference

CIPA was enacted October 15, 1980, as Public Law 96-456.[21] The procedures that it sets forth for early resolution of security issues begin with the right of either party or the court to call at any time after indictment for a prompt pretrial conference on matters relating to classified information that may arise during the course of the prosecution.[22] Among the matters addressed at a pretrial conference under CIPA are the timing of discovery, the provision by the defendant of the notice of intent to disclose classified information required elsewhere in CIPA, and the initiation of hearings to determine what classified information may be presented at trial.[23] The court also may consider other matters relating to the conduct of the trial during the pretrial conference.[24] An admission made by the defense during a pretrial conference may not be used against the defendant unless it is in writing and signed.[25]

B. Pretrial Discovery

With respect to discovery, CIPA allows the United States to make an *ex parte* showing to the court seeking to limit the disclosure of classified information to the defendant during the course of discovery under the Federal

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[19] 126 Cong.Rec. S8195 (daily ed. June 25, 1980).

[20] H.R. Rep. No. 96-1436, 96th Cong., 2d Sess. (1980).

[21] 94 Stat. 2025, 18 U.S.C. App. IV.

[22] CIPA, § 2.

[23] *Id.*

[24] *Id.*

[25] *Id.*

Rules of Criminal Procedure.[26] Upon a sufficient showing, the court may authorize the government to delete specified items of classified information from documents to be made available to the defendant, to substitute a summary of information in classified documents for the documents themselves, or to substitute a statement admitting relevant facts that the classified information being sought would tend to prove.[27]

The courts have upheld the examination of documents *ex parte* during discovery under CIPA to constitutional challenge.[28] Furthermore, the courts also have recognized a qualified governmental privilege to withhold certain material during discovery in CIPA cases that is similar in scope to the privilege to withhold an informant's identity recognized by the Supreme Court in *Rovario v. United States*.[29] In CIPA cases, the government may withhold classified information during discovery without an adverse effect on its prosecution unless the defendant can show that disclosure of the information being sought not only is relevant, but also is central to the defense or is essential to a fair determination of the case.[30] Moreover, it should be recalled that even when classified information is held to be discoverable after applying a *Rovario*-type balancing test, a court, upon a proper *ex parte* showing, still may order the release of the information sought in an alternative form.[31] Nonetheless, courts will disallow substitution for the original information sought where it finds the proposed substitution to be inadequate to protect the defendant's interests.[32]

C. Defendant's Notice of Classified Information

One major innovation of CIPA is to require the defendant to provide formal written notice to the government and the court of an intent to disclose

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[26] CIPA, § 4.

[27] *Id.*

[28] *United States v. Jolliff*, 548 F. Supp. 229, 231-232 (D. Md. 1981). The Federal Rules of Criminal Procedure also provide for *ex parte* examinations. Fed. R. Crim. P. 6(d)(1). Nonetheless, *ex parte* discovery proceedings still are criticized, particularly with respect to determining in what form otherwise discoverable evidence will be presented to a defendant. *E.g.*, Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 Am. J. Cr. L. 277, 306-315 (1986) [hereinafter *Tamanaha*].

[29] 353 U.S. 53 (1957).

[30] *See, e.g., United States v. Pringle*, 751 F.2d 419 (1st Cir. 1984). *See also United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988).

[31] CIPA, § 4.

[32] *E.g., United States v. Clegg*, 740 F.2d 16, 18 (9th Cir. 1984).

classified information.[33] Under this requirement, if a defendant reasonably expects to disclose or cause the disclosure of classified information in any manner in connection with trial or pretrial proceedings, the defendant must give notice to the court and the government within a period of time specified by the court or, where no time is specified, within thirty days prior to trial.[34] A notice of an intent to disclose must include a brief description of the information at issue. The notice requirement is a continuing one, and whenever the defendant learns of additional classified material that he may reasonably expect to introduce, he must provide additional notice to the government and the court. Once notice is given, the defendant may not disclose information known or believed to be classified until a hearing on its use has been held and an appeal, if any, has been completed. The court may prohibit the defendant from disclosing during criminal proceedings any classified information not included in a notice and may prohibit the defendant from examining any witness with respect to that information. On the other hand, because giving prior notice may put the defendant at an unfair disadvantage, the government must provide the defendant the information it expects to use to rebut the classified information in the notice whenever a court determines that the classified information in the notice may be disclosed during criminal proceedings. Failure by the government to provide rebuttal information may result in sanctions on the government similar to those that may be imposed upon a defendant for failure to give notice.

Various aspects of the notice requirement have been litigated before the United States district courts and courts of appeals.[35] During the course of this litigation, the courts at times have imposed sanctions on defendants who failed to provide adequate notice and denied them opportunity to pursue certain issues at trial. Courts imposing sanctions have characterized defendant's pretrial notice as "the central document in CIPA,"[36] explaining that "without sufficient notice that sets forth with specificity the classified

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[33] CIPA, § 5.

[34] CIPA, § 5(a).

[35] *E.g.*, *U.S. v. Badia*, 827 F.2d 1458 (11th Cir. 1987) (defendant's failure, despite government warning, to provide particularized notice of intent to disclose classified information held to preclude raising certain matters at trial even though the government may have had reason to believe that defendant intended to assert a defense implicating security matters); *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984) (notification requirement upheld to constitutional challenge based on fifth amendment); *United States v. Collins*, 720 F.2d 1195 (11th Cir. 1983) (defendant's notice held to be too general to comply with CIPA's requirement of a particularized notice setting forth specifically the classified information that may be disclosed); *United States v. Jolliff*, 548 F.Supp. 229 (D. Md. 1981) (notification requirement upheld to constitutional challenge).

[36] *United States v. Collins*, 720 F.2d at 1199.

information that the defendant reasonably believes necessary to his defense, the government is unable to weigh the costs of, or consider alternatives to, disclosure."[37] Furthermore, the courts have upheld the notice requirement to constitutional challenge.[38] The Supreme Court itself does not appear to have addressed the CIPA notice provision.[39] It recently has, however, upheld a State Supreme Court rule that precluded the introduction of certain testimony because defendant had failed to comply with a pretrial disclosure requirement.[40]

D. Hearings to Consider Classified Information

A pretrial notification by the defendant of an intent to introduce classified material would appear to be the primary means of alerting the court and other parties to a prospective classified information issue at trial. Presumably, classified information issues also could arise in other ways. For example, matters possibly could arise during trial that implicate sensitive information that could not have reasonably been foreseen prior to trial to be at issue. Also, issues relative to the government's use of classified information in its case may remain to be resolved in a judicial context. This may be so even though in many national security prosecutions any intrabranch conflict over what materials may be revealed during a public trial consistent with security interests presumably is resolved prior to a decision by the Department of Justice to seek an indictment. For example, a decision on whether to go forward with a prosecution may depend upon a ruling by the court on whether certain information may be introduced in alternative form. In other situations--prosecutions after appointment of an independent counsel under the Title VI of the Ethics in Government Act of 1978,[41] for example--circumstances may militate against full resolution of security issues within the Executive Branch prior to bringing formal charges.

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[37] *United States v. Badia*, 827 F.2d at 1465. *See also United States v. Collins*, 720 F.2d at 1199-1200 (requiring defendant to state with particularity which items he reasonably expects to disclose in his defense).

[38] *See United States v. Wilson*, 750 F.2d at 9 and cases cited therein.

[39] *E.g.*, 479 U.S. 839 (1986) *denying cert. to United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984).

[40] *Taylor v. Illinois*, ___ U.S. ___, 108 S.Ct. 646 (1988) (defendant's constitutional right to present testimony in his own behalf held not to prevent absolutely a rule that bars testimony for failure to comply with pretrial disclosure rule when weighty countervailing public interests are at stake).

[41] 28 U.S.C. §§ 591 *et seq.*

Regardless of how classified information issues arise, however, CIPA sets forth a hearing procedure for resolving them.[42] The hearing procedure provided, conducted at an early stage and outside of trial, determines separately (1) whether the classified information sought to be used is admissible and therefore should be disclosed[43] and, (2) if disclosure of particular information is authorized, in what form it may be introduced[44]. An initial hearing on classified information may be requested by the government within a period specified by the court.[45] At issue at the hearing are "all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding."[46] Both the government and the defendant may participate in a hearing, even though the hearing is conducted *in camera* upon certification by the Attorney General.[47] The government must notify the defendant as to what material is to be considered at the hearing.[48] This notification may describe the material by generic category only if the material has not previously been made available to the defendant.[49]

When the government's request for a hearing is filed prior to a particular pretrial proceeding or trial, the court must rule prior to the commencement of further proceedings.[50] The court must state in writing the basis of its determination concerning the use, relevance, or admissibility of each item of classified information.[51] A finding that classified information may be disclosed may trigger the alternative disclosure procedures. If the court determines that specific classified information may be disclosed, the government may move that the court, in lieu of disclosure, order the substitution of a statement admitting relevant facts or of a summary of the information.[52] The court is required to authorize substitution upon finding, after a further hearing, that a statement or summary will provide the defendant "with

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[42] CIPA, § 6.

[43] CIPA, § 6(a).

[44] CIPA, § 6(c).

[45] CIPA, § 6(a).

[46] *Id.*

[47] *Id.*

[48] CIPA, § 6(b).

[49] *Id.*

[50] CIPA, § 6(a).

[51] *Id.*

[52] CIPA, § 6(c).

substantially the same ability to make his defense as would disclosure of the specific classified information."[53] In connection with the motion for substitution, the government may submit an affidavit by the Attorney General explaining the basis for the classification of the information at issue and that disclosure of the information would cause identifiable damage to the national security.[54] An affidavit filed by the Attorney General may be examined *ex parte*.[55]

The court must order a defendant not to disclose otherwise admissible classified information whenever a substitution motion by the government is denied and the Attorney General files an additional affidavit with the court still objecting to the disclosure of the classified information at issue.[56] In such an event, the court must dismiss the prosecution unless the court finds that dismissal would not serve the interests of justice and orders other appropriate action in lieu of dismissal.[57] Further appropriate action may include, but need not be limited to, dismissing specified counts only, finding against the government on issues to which the undisclosed information pertains, or striking or precluding specified testimony.[58] An order dismissing a prosecution in whole or part or mandating other appropriate action may not take effect until after the government has had an opportunity to appeal the order and, if the appeal is unsuccessful, to withdraw its objection to disclosure.[59] The government may appeal a decision authorizing disclosure or imposing sanctions for nondisclosure immediately.[60] Such an interlocutory appeal must be considered by the court of appeals on an expedited basis.[61]

Much of the litigation on the "use, relevance, and admissibility" stage of CIPA hearings has addressed the appropriate scope of inquiry at that point. More particularly, litigants have questioned whether the government's interest in protecting classified information may be taken into account in determining what evidence may be admitted into evidence at all or whether that interest may be taken into account only when determining what alternative form, if any, otherwise admissible information may be introduced. The lead case in

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[53] *Id.*

[54] CIPA, § 6(c)(2).

[55] *Id.*

[56] CIPA, § 6(e)(1).

[57] CIPA, § 6(e)(2).

[58] *Id.*

[59] *Id.*

[60] CIPA, § 7.

[61] *Id.*

the area is *United States v. Smith*.[62] Smith, a former Army employee charged with selling certain material to the Soviet Union, sought to introduce classified information to support his defense that he had believed he was participating in a CIA double agent operation when transferred the material at issue. The district court and a panel of the court of appeals ruled that some of the information Smith sought to introduce was admissible because it was relevant evidence under the Federal Rules of Criminal Procedure.[63] According to these decisions, the government's interest in protecting classified information in the hands of the defendant is pertinent in CIPA hearings only at the stage of determining whether otherwise relevant information may be introduced in an alternative form. The court of appeals ruling *en banc* disagreed.[64] It rather held that a *Rovario*-type balancing test was appropriate not only during discovery in classified information cases, but also during relevance, use, and admissibility hearings.[65] This ruling thus allows the government to use national security interests to preclude the introduction of some classified information altogether, rather than be restricted to using those concerns only for the purpose of substituting alternative evidence. Nonetheless, even under this ruling, the defendant may be authorized to introduce classified material upon a showing that the material is "essential" or "necessary to the defense" and not "merely cumulative" nor "speculative."[66] The *en banc* ruling in *Smith* has been followed in later cases.[67]

There does not appear to be much reported litigation on the substitution procedures that follow a finding that classified information is relevant and admissible. However, even though the government may make a more complete and *ex parte* representation to the court at that stage on the sensitivity of the material at issue, it may be difficult to convince a court that evidence already found during the first stage of hearings to be central to the defendant's case nevertheless must be admitted only in a substituted form. Again, CIPA only permits a substitution to be made if it will leave the defendant with "substantially the same ability to make his defense."[68] At least

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[62] *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1984) (ruling 7-5 *en banc*); *United States v. Smith*, 750 F.2d 1215 (4th Cir. 1984); *United States v. Smith*, 592 F. Supp. 424 (E.D. Va. 1984).

[63] *United States v. Smith*, 750 F.2d 1215 (4th Cir. 1984); *United States v. Smith*, 592 F. Supp. 424 (E.D. Va. 1984).

[64] *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1984) (ruling 7-5 *en banc*).

[65] 780 F.2d at 1106-1110.

[66] *See* 780 F.2d at 1110.

[67] *E.g.*, *United States v. Zettl*, 835 F.2d 1059 (4th Cir. 1987).

[68] CIPA, § 6(c).

one court has held that introduction of edited documents would be unfair to the defendant because of their diminished effect.[69]

E. Other CIPA Provisions

In addition to the notification and hearing procedures for determining admissibility, CIPA sets forth separate standards governing the introduction of classified information into evidence. For example, CIPA states that a court may order that only part of a classified document or a redacted version of a classified document be introduced if admission of a complete document is unnecessary and consideration of an incomplete document is not unfair.[70] Furthermore, the government may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following an objection by the government, the court is to determine whether a prospective response may be admitted without compromising classified information.[71] Also, in an espionage or similar case requiring the government to prove that material relates to the national defense or constitutes classified information, CIPA requires the government to notify the defendant of the specific material it expects to rely upon to establish the national security element of the offense so that the defendant may have adequate time to prepare a defense.[72]

Two provisions of CIPA require other branches of government to adopt procedures relating to classified and the courts. First, CIPA directs the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, to prescribe rules establishing procedures for the protection of classified information in the custody of the federal courts.[73] Chief Justice Burger complied with this directive and issued security procedures February 12, 1981.[74] Second, CIPA directs the Attorney General to issue guidelines specifying the factors to be used by the Department of Justice in deciding whether to undertake a

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[69] *United States v. Clegg*, 846 F.2d 1221, 1224 (9th Cir. 1988).

[70] CIPA, § 8(b).

[71] Presumably these provisions primarily are intended to supplement the notice and hearing requirements that apply when a defendant has a reasonable expectation that classified information may be disclosed. In other words, the provisions appear primarily intended to cover those situations where the defendant does not have a reasonable expectation that classified information is implicated and does not realize that an answer to his inquiries may be classified.

[72] CIPA, § 10.

[73] CIPA, § 9.

[74] CIPA, § 9 note.

prosecution in which classified information may be revealed.[75] Third, CIPA further requires the Justice Department to prepare detailed written findings whenever it declines to prosecute a case pursuant to the guidelines.[76] Decisions not to prosecute under the guidelines also must, "[c]onsistent with applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches," be reported by the Justice Department to the respective Intelligence Committees and Judiciary Committees.[77]

III. CRITICISM AND RECENT DEVELOPMENTS: RULINGS IN THE TRIAL OF LT. COL. OLIVER NORTH

In their discussions of CIPA, courts and commentators have remarked that the Act is not intended to make substantive changes regarding defendants' rights and the use of classified information.[78] Rather, according to these authorities, CIPA is intended only to put in place procedural rules that facilitate early rulings on the admissibility of classified information alleged to be at issue and on the acceptability of substitutions for evidence found to be both sensitive and admissible.[79] At times, however, the procedural scheme set forth in CIPA itself may be seen as adversely affecting a defendant's rights, particularly where the defense expects to introduce a large amount of relevant classified information.

Orders of District Judge Gesell issued in the course of proceedings arising from the Iran-Contra affair illustrate how close adherence to CIPA may be seen as compromising a defendant.[80] The focus of the Iran-Contra affair are allegations that certain individuals secretly applied funds, including funds generated by a classified government effort to free Americans held in the Middle East, to various unauthorized purposes through deceiving Congress, obstructing investigations, and other unlawful means.[81] Of the four individuals indicted so far through the Independent Counsel appointed to investigate these events, most of the CIPA litigation has concerned the

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[75] CIPA, § 12(a).

[76] CIPA, § 12(b).

[77] CIPA, § 13.

[78] *E.g., United States v. Smith*, 780 F.2d at 1106 (majority opinion), 1112 (dissent); *Tamanaha, supra* n.28, at 294.

[79] *Id.*

[80] *United States v. Poindexter*, 698 F. Supp. 316 (D.D.C. 1988); *United States v. North*, 698 F. Supp. 323 (D.D.C. 1988).

[81] 698 F. Supp. at 302.

prosecution of Lieutenant Colonel Oliver North. After observing that "the most sensitive information and most critical national security intelligence methods and sources available to the government" appeared to be "inextricably enmeshed in the events challenged by the indictment [of Lt. Col. North]," Judge Gesell stated the following regarding the application of CIPA:

> It will be impossible to conduct this case under the precise strictures of CIPA, not only because of this broad intrusion into classified areas of information but also because it is impossible in advance to determine and correctly rule on all issues of relevance, materiality and admissibility. It probably was never contemplated that classified information problems of this magnitude would be presented to a trial judge in a case. . . .
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> [In enacting CIPA Congress] emphasized that the Court should not undertake to balance the national security interests of the government against the rights of the defendant but rather that in the end remedies and sanctions against the government must be designed to make the defendant whole again. Thus while a limited opportunity for creative judicial adjustment of CIPA procedures exists, in the end, defendant's constitutional rights must control.
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> . . . Counsel for North has urged that strict application of CIPA will force North to reveal to the government well in advance his strategy, his evidence, and, indeed, even aspects of his defense. . . . This, it is argued with considerable force, will place North at a practical and tactical disadvantage, infringing upon his constitutional rights under the Fifth and Sixth Amendments. . . . The Court has determined that many of these concerns can hopefully be avoided by applying pretrial procedures consistent with the congressional intent underlying CIPA. A way must be found to preserve defendant's constitutional rights that still affords adequate protection for national security concerns.[82]

Judge Gesell thus saw his task not as applying CIPA, which he believed would infringe upon the rights of Lt. Col. North, but rather as trying to at least preserve the spirit of CIPA by fashioning procedures that were tailored to the needs of the case before him. The procedure subsequently outlined by

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[82] 698 F. Supp. at 319, 320, 321.

Judge Gesell largely followed the notice provisions in CIPA but differed from CIPA in the diminished role given to the prosecution and, to a lesser degree, the court during pretrial review of material intended to be used by the defense. Rather than determining use and relevance issues at hearings where the prosecution was to be present, as is the case under CIPA, Judge Gesell set out a procedure under which the court and the defense alone were to meet concerning the use and relevance of items contained in the notice given by the defense. At these *ex parte* meetings, the judge was to actively explore with defense counsel possible substitutions for the classified information sought to be introduced. After the court, without divulging defense strategy, then ruled on the relevance and materiality of the remaining classified documents contained in the defense's notice, the court was to notify the interagency taskforce that was determining which documents could be released for the purpose of having these remaining documents reviewed. Only then could the prosecuting Independent Counsel become actively involved in examining materials in the defense's case, and this participation was limited to seeking substitutions for documents found by the taskforce to be too sensitive for full disclosure. Beyond reviewing classified documents contained in the defense's notice, Judge Gesell refused to consider in advance the subjects to be covered in the defense's opening statement or in the testimony of the defense witnesses, including the defendant's. Judge Gesell also gave the defense broad rights to discover information redacted in documents intended to be used by the prosecution.[83]

IV. CONCLUSION

In ruling that CIPA procedures must give way when they risk excessive exposure of the defendant's case, Judge Gesell highlights the limited efficacy of CIPA in highly sensitive cases. Judge Gesell's opinion suggests that the more a defendant relies on sensitive information, the more difficult it is to fashion procedures for resolving security issues. Furthermore, CIPA never has been seen as assuring that all security issues could be resolved. Rather CIPA is most effective as a means for resolving potentially troublesome cases in which the classified information at risk proves to be only marginally relevant or marginally sensitive. It remains problematic whether the disclose or dismiss dilemma posed by a prosecution involving sensitive information at its core can be resolved in a manner that preserves the rights of the defendant.

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[83] 698 F. Supp. at 321-322.